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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *et al.*,

Petitioners,

v.

HAROCO, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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February 25, 1985

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MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae.*

(Petitioners have consented to the filing of this brief, and a copy of their consent is on file in the Clerk's Office. Respondents have refused to consent to the filing.)

INTEREST OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association ("ABA") is the largest national trade association of the commercial banking industry in the United States. Its membership includes the vast majority of commercial banks, holding an estimated 95% of domestic assets of all American commercial banks. ABA member banks are located in each of the fifty states and the District of Columbia and include banks chartered by the United States and those chartered by their respective states.

This case involves a civil claim that a commercial bank violates the Racketeer Influenced and Corrupt Organizations Act when it lends money at an interest rate tied to the "prime rate," while at the same time making loans to other borrowers "below prime" (other elements of the statute being satisfied). It is one of a plethora of similar suits filed against commercial banks in at least fifteen states. Since RICO provides for treble damages, costs and attorneys fees, a decision by this Court which allows plaintiffs to turn an ordinary, run-of-the-mill, business dispute into a federal "racketeering" case would be seriously harmful to the industry. At the same time, commercial banks have appeared as plaintiffs in civil cases alleging violations of RICO under circumstances where it is apparent that a true pattern of racketeering activities is involved. An unduly restrictive decision by this Court pertaining to the scope of the RICO remedy would likewise be harmful to the victims of the kind of injury Congress sought to prevent by enactment of the statute.

WHEREFORE, it is respectfully requested that the Court grant leave to the American Bankers Association to file the attached Brief as *Amicus Curiae*.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the court below was correct in holding that the plaintiff's allegations of a cause of action under the Racketeer Influenced and Corrupt Organizations Act were sufficient to withstand a motion to dismiss.

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The American Bankers Association respectfully submits this brief as amicus curiae, to urge the Court to so construe the Racketeer Influenced and Corrupt Organizations Act as to preserve its remedial provisions for victims of true racketeering activities, while not permitting use of the law beyond the manifest intent of Congress. The case at hand, involving a member bank of the American Bankers Association, is an unfortunately typical example of a case in which

plaintiffs seek to recover treble damages, costs and attorneys fees for actions of the bank which Congress never intended to prohibit by its enactment of RICO. Even while upholding the claim in this case, the Seventh Circuit acknowledged as much:

> [I]t does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute.

Haroco v. *American National Bank & Trust Co.*, 747 F.2d 384, 399 (1984).

Even though it seems unlikely and may be inappropriate for interest calculations to be subject to litigation under RICO, the fact of the matter is that ABA member banks have been named defendants in cases similar to this one in at least fifteen states. As here, the claims typically allege that the defendant commercial bank has loaned money to the plaintiffs at an interest rate tied to the "prime rate," that "prime rate" is the lowest rate available to the bank's most creditworthy customers, that the bank has made loans to other customers at an interest rate lower than the published "prime rate," thus making the published "prime rate" false and fraudulent. It is further alleged in the typical case that the bank furthered the "fraudulent" scheme by using the United States mails on two or more occasions to send billing statements to the plaintiffs. This, then, is claimed to constitute "mail fraud" within the meaning of 18 U.S.C. § 1341 and the necessary predicate acts for "racketeering activity" under 18 U.S.C. § 1961(1).

The concept of a "prime rate" is considerably more complicated than the simplistic understanding of it which RICO plaintiffs seem to exhibit;[1] it is standard banking practice in modern times to tie the interest rate actually charged to a particular customer to a "prime rate"; and it is not unusual—or fraudulent—to charge certain customers an interest rate less than the announced "prime rate" where other terms and conditions of a particular loan sufficiently distinguish that loan from the type of loan for which the "prime rate" is set.[2] It simply belies common sense and corrupts the language to maintain that reasonably normal banking practice constitutes "racketeering activity."

The simple solution to the prime rate/RICO problem would be for us to urge this Court to adopt the reasoning of the Second Circuit in *Sedima S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482, 496 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648), and hold that a plaintiff must plead and prove two or more convictions of the defendant for mail fraud or any of the other predicate offenses, in order to state a claim for relief under RICO. While such a

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[1] *See* G. Fischer, *The Prime: Myth and Reality*, 93-105 (1982).

[2] In this case, by way of example, the bank is alleged to define "prime rate" as "[t]he rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans." (Complaint, ¶ 14). If the "prime rate" at a particular time happened to be 12%, a *secured* loan made at 11% or a *six-month* loan made at 11.5%, or a *non*-commercial mortgage loan made at 10.5% would not be loans made "below prime." They would simply be loans made at appropriate interest rates for the particular class to which they belonged, wholly unrelated to the appropriate rate or rates for other classes of loans—such as 90-day unsecured commercial loans.

conclusion can be justified by the plain words of the statute, as the Second Circuit does, that conclusion would render the statute virtually meaningless and deprive victims of true racketeering activity of the protections and remedies Congress intended for them. A good example of this problem is *Bankers Trust Co.* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657) in which the defendants are alleged to have committed bankruptcy fraud, perjury, and bribery of a state court judge—certainly not run-of-the-mill business practices in any event. As dissenting Judge Cardamone stated, "[i]f civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." *Bankers Trust Co.* v. *Rhoades,* 741 F.2d at 518 (Cardamone, J., dissenting).

Thus, members of the banking industry have legitimate interests on both sides of the issues presented by this case. As a representative of that industry, the American Bankers Association believes it is equipped to suggest a dividing line between the kind of cases RICO was intended to cover and those it was not, based upon the construction of the words "by reason of" appearing in the statute and by a discussion of the need for separate entities to satisfy the "person" and "enterprise" elements of the statute.[3]

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[3] There is another statutory construction issue involved in this case, which we believe should be resolved by the Supreme Court as well, but the focus of this brief shall be primarily upon these two problems. The other issue is the degree of specificity with which a plaintiff must allege a RICO violation. Some courts have held RICO plaintiffs to the same test of specificity as would be required for a criminal bill of particulars. (*See, e.g., Bache Halsey Stuart Shields Inc.* v. *Tracy Collins Bank & Trust Co.,* 558 F. Supp. 1042, 1045 (D. Utah. 1983).) Here, the Seventh Circuit held that a RICO allegation (at least where a form of "fraud" constitutes the predicate offenses) must satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *Haroco,* 747 F.2d at 404-405. We believe that that is the proper test but do not agree with the court that the test was satisfied in this case. The rule requires that the circumstances constituting fraud shall be stated with particularity. Here there are simply no allegations as to the identity of persons to whom "below prime" loans were made, what rates were charged on those loans, the amounts of alleged overcharges, and so forth. Such vague allegations fail to satisfy the specificity requirements of Rule 9(b). *See Bennett* v. *Berg,* 685 F.2d 1053, 1062 (8th Cir. 1982), *on reh'g,* 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied,* 459 U.S. 527 (1983).

SUMMARY OF THE ARGUMENT

Certiorari was granted in this case and in *Sedima* no doubt in order to resolve an irreconcilable conflict between the Second and Seventh Circuits over the proper construction of the Racketeer Influenced and Corrupt Organizations Act. Neither of the two decisions represent a satisfactory answer to the statutory construction problems presented by the law. If the Seventh Circuit's reasoning is followed, far more claims will be permitted to be filed under the statute than Congress ever intended; if the Second Circuit's reasoning is followed, few, if any, claims will be permitted under the statute, and Congress could not have intended that result either.

In construing the statute, the Supreme Court should consider the nature of the activity for which Congress sought to provide a cause of action, rather than the nature of the injury resulting from alleged racketeering activities, as the lower courts have done. Concentrating on the activity rather than the injury, which

is fully consonant with the statute, will enable courts and juries in the future to draw the necessary fine line between real RICO violations and ordinary, garden variety fraud which, although compensable under state common law or other state or federal statutes, does not rise to the level of a RICO violation.

ARGUMENT

The Racketeer Influenced And Corrupt Organizations Act Provides A Remedy Only To Those Who Suffer Injury Caused By An Activity The Law Was Designed To Deter

A. *The "By Reason Of" Requirement*

The Racketeer Influenced and Corrupt Organizations Act provides in relevant part that "[a]ny person injured in his business or property *by reason of* a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." (18 U.S.C. § 1964(c) (1970)) (emphasis added). Section 1962, in turn, makes it unlawful for a *person* who has engaged in a pattern of racketeering activity to take part in the ownership, control, establishment, operation or participation in the conduct of the affairs of an *enterprise* engaged in or affecting interstate commerce. "Racketeering activity" is defined in Section 1961(1) as the commission of any of a series of criminal acts chargeable under state law and punishable by imprisonment for more than one year or any act which is indictable under various federal criminal statutes, including mail fraud and wire fraud. A "pattern" requires at least the commission of two such acts within ten years of one another (18 U.S.C. § 1961(5) (1970)).

It is obvious from a reading of the statute's plain words that RICO does not prohibit, or provide a remedy for, commission of the so-called "predicate acts." Mail fraud, wire fraud, state law felonies, and so forth, are prohibited by other pre-existing sections of federal or state law. By its own terms, RICO prohibits a *pattern* of racketeering activity and limits the damage remedy to those who are injured by this *pattern* and can satisfy the other elements of the statute. In the Second Circuit case now before this Court for review, Judge Oakes wrote that

> RICO was intended not simply to provide additional remedies for already compensable injuries, but rather to provide added remedies and procedures to fight certain specific kinds of organized criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by the predicate acts as are alleged here.

Sedima, 741 F.2d at 494 (footnote omitted).

This construction of the words, "by reason of," is consistent with the Supreme Court's construction of the same words appearing in Section 4 of the Clayton Act, 15 U.S.C. § 15, which grants a treble damage remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977), this Court held that the Clayton Act remedy was designed to recompense "injury of the type the antitrust laws were intended to prevent." Similarly in this case, the treble damages of RICO should be available to those

who suffer injury of the type RICO was intended to prevent.

In this case, however, the Seventh Circuit held that injury arising from the commission of two or more of the predicate acts, standing alone, constitutes injury by reason of a violation of Section 1962, and that there is no need for a plaintiff to plead and prove some sort of special racketeering injury above and beyond the injury caused by the predicate acts. *Haroco,* 747 F.2d at 393. In reaching that conclusion, the court took strenuous issue with the Second Circuit's efforts to define the special racketeering injury that it requires plaintiffs to plead and prove. The Seventh Circuit calls it an "elusive racketeering injury requirement" *Id.* at 399, and argues that the Second Circuit's hypothetical examples of injuries attributable to a pattern, but not to individual predicate acts, are "inconsistent with the rest of the opinion." *Id.* at 397. The Seventh Circuit's criticism of the Second is well-taken in this instance.

We think that both courts have focused on the wrong aspect of the language in the statute pertaining to injury caused by reason of a pattern of racketeering activity. We suggest that it is not the nature of the *injury* which plaintiffs either must or need not claim to be "special" in any sense. In some cases, injury stemming solely from the commission of predicate acts should be enough to warrant recovery under RICO; in other cases, such injuries should not be sufficient to award treble damages. What is the more appropriate aspect of the law to consider is rather the nature of the *activity* which causes injury. We urge the Court to hold that plaintiffs must plead and prove that the activity involved is a "special" racketeering activity.

By this, we do not mean to suggest that plaintiffs must plead and prove that the defendant is a member of some recognized organized criminal group. The type of activities for which Congress intended to provide recompense under RICO are those which are "characteristic of organized crime," whether or not actually committed by organized crime figures. S. Rep. No. 617, 91st Cong., 1st Sess. 34 (1969); McClellan, *The Organized Crime Act, (S.30) or its Critics: Which Threatens Civil Liberties?,* 46 Notre Dame Law. 55, 142 (1970).

Focusing on the nature of the activity rather than on the nature of the injury would lead to the conclusion that there will be instances in which the commission of two or more acts of "mail fraud" will constitute a compensable RICO violation where the facts show that the mail fraud was committed in a fashion one would expect of true racketeers, whereas in other cases two or more acts of "mail fraud" would not add up to a RICO violation where the facts show little more than a garden variety misstatement of fact communicated through the mails in the course of an ordinary business transaction.[4]

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[4] Here again, we do not mean to excuse the commission of fraud in ordinary business transactions. A plaintiff able to plead and prove such a fraud should be entitled to recover damages for any losses incurred as a result. And, of course, such a plaintiff is entitled to recover damages for fraud under state common law. The issue in this case is whether Congress intended to federalize virtually all forms of state common law fraud actions and to award to plaintiffs treble damages for garden variety fraud. It is impossible to read such a Congressional intent into a statute whose stated purpose is "eradicating organized crime from the social fabric." *United States* v. *Turkette,* 452 U.S. 576, 585 (1980).

The approach we suggest here is consistent with the plain language of the statute. As indicated above, RICO does not prohibit the listed predicate acts; it prohibits a *pattern* of racketeering activity. Section 1961(5) says that a " 'pattern of racketeering activity' requires *at least* two acts of racketeering activity." (Emphasis added.) The statute does *not* say that a pattern *means* two acts of racketeering; it does *not* say that two acts of racketeering activity will always suffice; nor does it say that *only* acts are required. More may be required under the facts of a particular case. An analogous definitional problem with which the banking industry is quite familiar arises under the McFadden Act, which limits the ability of National banks to establish branches only to the extent that a state-chartered bank in the same state could establish branches. The law provides (12 U.S.C. § 36(f)) that the term "branch" "shall be held to include any . . . branch place of business . . . at which deposits are received, or checks paid, or money lent." Several cases have arisen in which it is claimed that a national bank's separate facility is a "branch" even though it does not perform any of the three listed functions. *E.g., St. Louis County National Bank* v. *Mercantile Trust Co. National Association,* 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977); *Securities Industry Association* v. *Comptroller of the Currency,* 577 F. Supp. 252 (D.D.C. 1983), *appeal docketed,* No. 84-5026 (D.C. Cir. Jan. 18, 1984). This Court, in construing the McFadden Act, has held that the performance of the three listed functions, or any of them, "defines the *minimum* content of the term 'branch'. . . . [I]t may include more." *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122, 135 (1969) (emphasis

supplied). So too in this case, the statutory description of the "pattern of racketeering activity" defines the minimum content of the term. In short, if the plaintiff is unable to plead or prove the commission of two predicate acts, there is no valid RICO claim. But even if a plaintiff *can* plead and prove two predicate acts, that may or may not suffice, depending upon the facts of a particular case. The term "may include more."

There still remains the question of how to draw a dividing line between those cases in which proof of the commission of two predicate acts, without more, shall suffice to constitute a RICO violation and those in which proof of something above and beyond the mere predicate acts will be required.

Perhaps the judge who wrote that "[c]ourts recognize a racketeering enterprise injury when they see it"[5] came closest to the answer. This is, as the judge acknowledged, a paraphrase of Justice Stewart's famous comment on the problems of defining "hard core pornography." *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In pornography cases, branch banking cases, negligence cases, cases involving application of the "prudent man rule," and in many other areas of the law, there are not firm and fixed definitions which answer all possible questions. In these cases, the courts impose a "facts and circumstances" test. In pornography cases, for example, the test is whether the average person, applying contem-

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[5] *Willamette Savings & Loan* v. *Blake & Neal Finance Company,* 577 F. Supp. 1415, 1430 (D. Or. 1984). *See also Waste Recovery Corp.* v. *Mahler,* 566 F. Supp. 1416, 1468-69 (S.D.N.Y. 1983).

porary community standards, would find that the work, taken as a whole, appeals to the prurient interests, is presented in a patently offensive manner, and is without serious literary, artistic, political or scientific value. *Miller* v. *California,* 413 U.S. 15, 24 (1973). (*See also Ginzburg* v. *United States,* 383 U.S. 463 (1966), in which it was held that the circumstances of presentation of an allegedly obscene work were relevant in determining whether claims of redeeming social value were pretense or reality.) In "prudent man" cases, the rule is that a trustee should conduct himself on behalf of settlors and beneficiaries in the manner that men of prudence, discretion and intelligence manage their own affairs. *Harvard College* v. *Amory,* 9 Pick. 446, 461 (Mass. 1830). RICO cases ought not be any different. We know from the legislative history that Congress intended there to be a civil remedy for activities which are characteristic of organized crime. A court, as finder of fact, or a jury, under proper instructions, certainly ought to be able to determine, after a trial (or on motion for summary judgment) whether the acts alleged were actually committed by the defendant and, if so, whether those particular acts were of such a nature as to be characteristic of organized crime—even if committed by a defendant with no real connection to a recognized criminal organization. We already expect fact finders to determine how prudent men conduct themselves and whether a particular defendant met that standard; it cannot be any more difficult to expect a fact finder to determine how a gangster would conduct himself and whether the particular defendant met *that* standard. We already expect fact finders to decide what are contemporary community standards, and what is patently offensive under those standards. It cannot be

any less reasonable to ask that a fact finder determine whether a particular activity so far exceeds the community norm for doing business as to be classified as a racketeering activity rather than as simple garden variety fraud.

We could not here begin to suggest all of the possible forms of mail fraud or wire fraud which could ever be committed, and try to classify each of them into RICO and non-RICO categories. But perhaps one or two examples will suffice to demonstrate the point. We believe, for example, that the approach we suggest could satisfy Judge Cardamone's concern in the *Bankers Trust* case. It is, no doubt, correct to say that there is no special racketeering "injury" in *Bankers Trust,* as defined by the Second Circuit. However, we believe that a judge or a jury could well find, under the "facts of this totally outrageous case" that there was a special racketeering *activity* involved. The approach we suggest should also satisfy the concerns of the Second Circuit majority that "such respected and legitimate 'enterprises' as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Stearnes & Co., and Merrill Lynch . . . [not be] labeled as 'racketeers.' " (*Sedima,* 741 F.2d at 482). Even if a judge or a jury were to conclude that "mail fraud" or "wire fraud" had, in fact been technically committed by such a company in the context of an otherwise entirely legitimate business transaction, the judge or jury could well find that the offenses did not, under the circumstances, rise to the level of activities characteristic of organized crime. The result of such a conclusion would be that the plaintiff would receive the damages to which he would otherwise be entitled under state common law, the federal securities laws,

or other bases for a cause of action. The plaintiff, in such a case, would only lose the windfall of treble damages, which Congress never intended to provide to him or her anyway. Finally, the approach we suggest would enable the Seventh Circuit in this case to follow its understanding that Congress probably never really intended RICO to apply to "improperly calculated interest charges by a commercial bank" without at the same time so construing the statute as to rule out legitimate cases which Congress *did* intend to cover.

B. *The "Person/Enterprise" Problem*

In the preceding section of this brief we discussed the need, under the statute, for a "pattern of racketeering activity" to have caused an injury in order for a plaintiff to be entitled to RICO damages. But the "pattern of racketeering activity" is only one of the elements a plaintiff must prove. The law requires something more. That something more is that the defendant—characterized in the statute as a "person" —must cause injury to the plaintiff's business or property by reason of the defendant's violation of Section 1962. Section 1962, in turn, declares it unlawful for such "person" to conduct or participate in the conduct of an "enterprise's" affairs through the pattern of racketeering activity.

It is this relationship between the statutory "person" and "enterprise" that provides an additional basis for defining a special racketeering activity requirement which recognizes the clear statutory language, yet still implements the underlying statutory purpose. One of the few points upon which the many courts which have construed civil RICO have virtually all agreed is that RICO requires that there be two

entities or individuals which interact to bring about the plaintiff's injury, and that the injury must be traceable to the "person's" conduct of a separate "enterprise" through a pattern of racketeering activity. For this reason, cases have almost universally been dismissed where only one entity was involved. In such cases, almost all courts have held that there must be two actors, and that a single entity cannot be both the statutory "person" (amenable to a civil suit for damages) and the statutory "enterprise" (which cannot be sued for damages).[8]

The necessity for separate entities to constitute the "person" and "enterprise" is apparent not only from the statutory language itself, but also stems from the legislative purpose which underlies the enactment of RICO. As this Court and many others have noted, "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime." *United States* v. *Turkette,* 452 U.S. 576, 591 (1980).

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[8] *B. F. Hirsch* v. *Enright Refining Co., Inc.,* No. 84-8087 (3d Cir. Dec. 31, 1984); *Rae* v. *Union Bank,* 725 F.2d 478, 481 (9th Cir. 1984); *Bennett* v. *Berg,* 685 F.2d 1053, 1061 (8th Cir. 1982); *United States* v. *Computer Science Corp.,* 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983); *Willamette Savings & Loan* v. *Blake & Neal Finance Co.,* 577 F. Supp. 1415, 1427 (D. Or. 1984); *Wilcox Development Co.* v. *First Interstate Bank of Oregon, N.A.,* 590 F. Supp. 445 (D. Or. 1984); *Kaufman* v. *The Chase Manhattan Bank N.A.,* 581 F. Supp. 350 (S.D.N.Y. 1984); *Nelson* v. *National Republic Bank,* [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,481 (N.D. Ill. 1984); *Kirschner* v. *Cable/Tel Corp.,* 576 F. Supp. 234 (E.D. Pa. 1983); *D&G Enterprises* v. *Continental Illinois National Bank,* 574 F. Supp. 263, 270 (N.D. Ill. 1983); *Yancoski* v. *E. F. Hutton & Company, Inc.,* 581 F. Supp. 88 (E.D. Pa. 1983).

Thus, the statutory "person" is the analogue of organized crime, while the statutory "enterprise" is the infiltrated business, victimized by its takeover or domination by the "person" whose activities Congress was aiming to deter and punish. Whether the "persons" sued are truly members of "organized crime" is, as we pointed out above, irrelevant, since Congress chose to permit suits against those "persons" who had engaged in the enumerated predicate acts, provided they also conducted the affairs of a separate "enterprise" through a pattern of racketeering activity.

Reading the key statutory provisions together and considering the purposes underlying RICO, we respectfully submit that a civil RICO treble damage plaintiff should be required to prove (1) the commission by a defendant "person" of the required "pattern of racketeering activity," (2) substantial domination or control of that "person" (3) over the conduct of the affairs of a separate "enterprise" through such pattern of racketeering activity, and (4) damage resulting to the plaintiff from the "person's" conduct of the "enterprise's" affairs through such a pattern.

Application of the statutorily-rooted four-part test set forth above will screen out those cases which do not present the concerns Congress sought to address in RICO, while still preserving a right to damages for appropriate victims of a "pattern of racketeering activity." In this case, for example, there is no allegation that any individual or entity (the RICO "person") caused a separate and independent entity (the RICO "enterprise") by reason of the defendant's domination or control, to overcharge the borrowers by conducting the enterprise's affairs through multiple

acts of mail fraud. The mail fraud allegations are instead directed solely at the bank itself, and the bank's actions are not alleged to have been affected in any way by any other entity.

While the Seventh Circuit recognized below that RICO required a separate "person" and "enterprise" for civil liability to be found, it erroneously held that the bank defendant could be said to have operated the affairs of its holding company parent because "we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation." *Haroco,* 747 F.2d at 402-403. Such reasoning completely ignores both RICO's language and purpose. The approach adopted by the Seventh Circuit fails to recognize that there is no allegation in this case that the bank, in the act of overcharging its borrowers, dominated or controlled its parent in such a way as to cause the parent to act in an illegal manner. Instead, the total relationship at issue in this case is that of bank to borrower; and that relationship does not implicate in any active manner the affairs of the bank holding company. Indeed, the addition of the bank holding company in this very case was an afterthought in an Amended Complaint which was filed only after a Motion to Dismiss attacked the original Complaint's characterization of the bank as both the "person" and "enterprise." The bank holding company was neither sued nor mentioned in the original Complaint.

The Seventh Circuit's approach, moreover, makes RICO civil liability ultimately turn on the neutral, passive fact of whether the defendant "person" happens to be an independent or affiliated corporation, rather than requiring active conduct by the defendant

which causes illegal activity by a separate entity by virtue of the defendant's domination or control over that entity. In doing so, the court acted inconsistently with the decision of this Court in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. 2731 (1984), in which the Court held that a parent corporation and a wholly owned subsidiary are incapable of conspiring with one another for purposes of the antitrust laws. The Seventh Circuit in this case expressly declined to follow *Copperweld* because of allegedly different premises behind RICO and the antitrust laws. We maintain that this is not an adequate distinction. What this Court said about parents and subsidiaries is equally true and applicable without regard for the particular context:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. *Id.* at 2742.

If liability is to be predicated upon the interrelationship of the bank and bank holding company, a RICO plaintiff must be able to allege some meaningful domination or control by one of those entities (the "person") over the affairs of the other (the "enterprise") in such a way as to cause the other to commit illegal activity as a matter of corporate policy dictated by the defendant. A mere relationship or association, without more, is a neutral fact under RICO, which requires the active "conduct" by the "person" of the affairs of the "enterprise."[7] As the Eighth Circuit

[7] It is for this reason that the suggestion that individual employees, such as loan officers, could be viewed as the RICO "persons" is also unsound, unless such individuals exercised such domination or control over the enterprise bank as to affect its corporate policies. Otherwise, an illegal act of mail fraud by a loan officer might result in the "enterprise" bank itself being held liable even where it was not involved in the individual's wrongdoing, a result wholly inconsistent with the clear statutory language, as well as the policies underlying RICO.

en banc properly held in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 (1983) on this very point:

> [T]he en banc court is concerned that the complaint may be deficient as failing to allege adequately the requisite degree of participation in or conduct of the affairs of an enterprise on the part of each named defendant. Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.

The appropriate parameters of a special racketeering activity requirement can further be illustrated by a comparison of the results which would be obtained under the four-part test suggested in this section with those obtained by the Second Circuit in its recent decisions in *Sedima* and *Bankers Trust*.

While the Second Circuit dismissed both cases, we respectfully submit that the dismissal in *Sedima* was correct (though for different reasons), but that the result in *Bankers Trust* cannot be harmonized with RICO's statutory purpose. *Sedima* involved a claim that the plaintiff was defrauded by its joint venturer

on a sale of goods to a foreign company through fraudulent purchase orders and other false documents which overstated costs. Since the joint venturer defendant's own fraudulent acts provided the basis for the RICO claims and the alleged fraud did not involve the domination or control by any discrete "persons" over the affairs of the joint venturer "enterprise" defendant, the RICO claims were properly dismissed, since these claims did not implicate any of the concerns which caused Congress to enact RICO.

In *Bankers Trust,* by contrast, allegations of a series of fraudulent acts by a group of controlling individuals and entities to strip a dominated enterprise of valuable assets, rendering it unable to repay the plaintiff bank on a loan, are sufficient, in our view, to satisfy the special racketeering activity requirement advocated in this Brief. *Bankers Trust* clearly identified a group of discrete controlling "persons" who dominated the borrower "enterprise" (Braten Apparel Corporation) and caused its affairs to be operated to the detriment of the plaintiff bank by stripping Braten of assets through a series of fraudulent acts, characteristic of organized crime, which qualified under Section 1961(5) as a "pattern of racketeering activity." In our view, this is all that RICO requires.

CONCLUSION

For the reasons stated herein, we respectfully urge the Court to adopt a construction of the Racketeer Influenced and Corrupt Organizations Act which would allow recovery of treble damages, costs and attorneys fees in those cases where a defendant has acted in a fashion characteristic of organized crime and has infiltrated and controlled or dominated a separate enterprise, all other elements of the claim being satisfied. This focus on the special nature of the activity involved rather than the special nature of the injury is a reasonable solution to an otherwise intractable definitional problem. Properly applied, the approach suggested will require neither that the statute be used to cover cases never intended by Congress nor that victims of true racketeering activity be deprived of the remedies Congress clearly intended for them. Moreover, the suggested approach fits well within the plain meaning of the statute and the legislative intent.

If the approach we suggest is adopted, the case now before the Court should be returned to the federal district court for further proceedings, in which the plaintiffs will be required to plead and prove, if they can, that the *activities* of the defendant bank were so far beyond the pale of normal business activity as to be characteristic of organized crime, and that the defendant bank controlled or dominated a separate

enterprise in a manner reminiscent of an infiltration of the enterprise by organized crime.

Respectfully submitted,

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